IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO. 2010 OF 2005
IN
SECOND APPEAL NO. 40 OF 1996

Balgaonda Paygonda Patil .. Applicant

Vs.

Ashok Paygonda Patil .. Respondent

WITH

CIVIL APPLICATION NO. 2011 OF 2005
IN
SECOND APPEAL NO. 43 OF 1996

Balgaonda Paygonda Patil .. Applicant
(Org.Plaintiff)

Vs.

1. Godabai Paygonda Patil
Since deceased by heirs
1a) Akkatai Paygonda Patil
and ors. .. Respondents

Mr. V.A. Thorat, Sr. Counsel with Ms. A.R.S. Baxi for the applicant.
Mr. A.A. Kumbhakoni with Shri M.V. Limaye for Respondents.

CORAM: B.H. MARLAPALLE, J.
Date : December 14, 2005.

P.C.:

1. Heard Mr. Thorat, the learned Senior Counsel with Ms. Baxi for the applicant and Mr. Kumbhakoni, the learned counsel for the respondents.

2. Parties are brothers inter se and the applicant-appellant was the original plaintiff in RCS No.192 of 1997 as well as RCS No.229 of 1987 which came to be decided by a common Judgment dated 12/4/1990.

3. These applications were directed to be registered on 17/11/2005 and the learned counsel for the respondents has filed affidavit in reply opposing the same.

3A. While admitting Second Appeal Nos.40 of 1996 and 43 of 1996 substantial questions of law were not framed by this court and, therefore, as noted in the order dated 17/11/2005, the appellant sought amendment in the appeal memo so as to frame the substantial questions of law. The proviso below Section 100 of C.P.C. empowers this court to hear the appeal on any other substantial question of law not formulated on having been satisfied that the case involves such question, but for the reasons to be recorded.

4. Mr. Kumbhakoni, the learned counsel for the respondents submitted that the questions of law framed

in the original appeal memo and now sought to be incorporated by these applications in the appeal memo are different and if these substantial questions of law, sought to be added, were included in the original appeal memo, perhaps there was no case to admit these second appeals.

5. The trial court had decreed the suits and directed the defendants to deliver possession of the suit properties to the plaintiff. In reply to the issue no.1 framed for consideration in para 11 of the trial court's judgment, it has been held that the suit properties are owned by the plaintiff on the strength of Will executed by his grandfather in his favour and, therefore, he did not get the suit properties on the strength of the partition but on the strength of the Will.

5A. Whereas the Lower Appellate Court framed the main issue as under and answered the same in the negative:-

"Whether the plaintiff/respondent has proved exclusive title to the suit properties?

6. The Second Appeal Nos.40 of 1996 and 43 of 1996 have been admitted on 7/3/1996 as noted in the order dated 17/11/2005 and the appeal memo did not frame any substantial questions of law. However, after hearing both the parties, I am satisfied that the substantial questions of law for consideration in both these second appeals is as under:-

> "Whether the Lower Appellate Court was right in its findings that the plaintiff failed to prove his exclusive title to the suit properties?

7. Both the applications disposed off accordingly.

(B.H. Marlapalle,J.)